Department of Law Monthly Report

Department of Law
Office of the Attorney General
State of Alaska

November and December 2001
Issue Date – January 31, 2002

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In This Issue

Collections & Support

COLLECTIONS UNIT

The forms and procedures for victim restitution collection have been finalized. The restitution project now has access to the Department of Corrections and the District Attorney's Office databases, and we are working on obtaining access to the Department of Labor and the Permanent Fund Dividend Division databases to facilitate collection and disbursement of restitution. Van Rauch created a new database program to allow us to track and collect restitution judgments and a program to allow us to file satisfactions of judgment electronically.

In November – December, the Collections Unit opened five new civil collection files and closed ten OSHA penalty collection cases. Demand letters were sent to eleven APOC debtors and seven OSHA debtors.

On the criminal side, the amount we have received from the 2001 PFD attachment so far is $2,924,135.75.

PERSONNEL NEWS

AAG Jeff Killip recently joined the section. Jeff comes to us from the Human Services section and will be handling a full-time caseload of child support matters in the Third Judicial District.

PATERNITY TESTING ORDERED

In a recent case handled by the Fairbanks AGO, AAG Pam Hartnell and paralegal Karol Alderman obtained an order for paternity testing where the putative father (the defendant) admitted paternity. Based on the defendant's admission, we filed a motion for judgment on the pleadings. The child's mother filed an opposition, stating that she was not sure that the defendant was the child's father and wanted paternity established through DNA tests rather than by the defendant's admission. We advised the court that CSED would administer the paternity tests if the court ordered testing, and we submitted a proposed order to that effect. The court denied our motion for a judgment of paternity on the pleadings and entered our order for paternity testing.

DRIVER'S LICENSE DENIED

In a recent driver's license denial case, AAG Connie Carson obtained an order affirming CSED's licensing decision because the child support obligor, Lee, failed to show that he was entitled to relief from the licensing action. Lee claimed a variety of medical problems but did not submit documentation to support a claim that he is medically unable to work. Lee also contested the arrears, claiming that he never received a copy of the default divorce decree requiring him to pay $1,108 per month. Although his name was not on the clerk's distribution list, there was a record of his being served with the accompanying child custody and support order. At the continued hearing, AAG Carson asked the court to clarify the amount of the monthly support obligation because the decree said Lee must pay $554 per child, while the custody and child support order stated that Lee must pay $227 per child for a total of $554 per month. The court confirmed that the total per month should be $554, instead of $1,108 per month. The court's finding reduced Lee's arrearage significantly but not enough to put him in compliance with the support order. Therefore, the court affirmed the denial of Lee's driver's license.

JUDGE GONZALEZ VACATES ORDER

In *Austin v. Berkbigler*, Judge Gonzalez issued an order granting AAG Jeff Killip's Motion to Set Aside Order re Child Support under Civil Rule 60(b)(1). Pursuant to its regulations, CSED had issued an administrative support order that established arrears back to December 1997, which was the first month of the most recent continuous period of public assistance. The custodial parent, Ms. Austin, then filed a court action against the child's father to obtain arrears for periods prior to December 1997. The court dismissed the action because the judge believed that the administrative order precluded such an action. In our motion, we argued that Judge Gonzalez had mistakenly dismissed Ms. Austin's child support claims for periods pre-dating the administrative support order, had inadvertently misconceived CSED's role in the establishment of child support in this case, and had misapplied the applicable statute of limitations under AS 09.10.040. Judge Gonzalez agreed with CSED's analysis and vacated his previous order.

Commercial Section

CIRI SHAREHOLDERS v. STATE

On November 1, Judge Peter Michalski issued an opinion upholding an administrative order directed at dissident CIRI shareholders by the Division of Banking, Securities and Corporations. The division issued the order in

1998, following findings that the shareholders had distributed false and misleading proxy statements. With the order, the division imposed monetary sanctions of $2,500 on the shareholders, mandated that they cease and desist from violating security laws in the future, and declared the 1998 proxy statements void.

The shareholders objected to the order and requested an administrative hearing. The Department granted their request and conducted a 14-day administrative hearing. At the hearing's conclusion, the hearing officer recommended that the division's order be affirmed. The shareholders then appealed to superior court.

Judge Michalski's November 1st decision should settle the matter. The time for appealing the decision to Alaska's Supreme Court has passed without the filing, by the shareholders, of a notice of appeal. AAG Dan Branch, of the Juneau Commercial Section, represented the division in this administrative appeal.

ABC BOARD ALLOWS SITKA PILOT HOUSE RELOCATION

AAG Linda Kesterson advised the Alcoholic Beverage Control Board in its consideration of an application by the Pilot House in Sitka to relocate its premises. The City and Borough of Sitka did not protest the relocation, but an objection was filed by the Sitka Tribe of Alaska. The Sitka Tribe filed its objections to the relocation both as an objection under AS 04.11.470, which permits any person to object to an application and also as a local government protest under AS 04.11.480. The latter statute obligates the Board to deny an application unless it finds that the protest by the local government is arbitrary, capricious, and unreasonable. The Board, on advice of counsel, treated the Sitka Tribe's objection as an objection and not as a local government protest. Following 1½ hours of public testimony, the Board granted the application for relocation, with some restrictions. The Sitka Tribe of Alaska has filed an appeal to the superior court and the matter is currently in the briefing stage.

RCA BRIEF ON FORT RICH HATCHERY POWER

AAG Virginia Rusch prepared the RCA's brief in a superior court appeal of an order authorizing Anchorage Municipal Light and Power to provide electric service to the state fish hatchery located on Fort Richardson, and requiring ML&P to list all on-base customers on its utility certificate. Appellant Chugach Electric Association contends that the RCA's order violates the supremacy clause of the United States Constitution by interfering with military procurement. The RCA contends that the appeal asks for an improper advisory opinion since there is no issue of military procurement in the case and the RCA specified that it was not deciding how it would rule in any matter involving a military procurement.

RUSCH'S GARDEN FEATURED

The cover photo on the current (February) issue of the magazine *Country Living Gardener* is a picture of AAG Virginia Rusch's garden and log home in Anchorage. Check it out!

Environmental

ABANDONED BARGE REMOVED FROM STATE LANDS

The grounded barge HOMEBAR I was successfully removed from state tidelands off Elizabeth Island in Lower Cook Inlet. AAG Breck Tostevin represented the Department of Natural Resources in the tug boat operator's federal limitation of liability action and secured an agreement from the vessel's insurers to remove the barge.

DEC PREVAILS ON 1995 PRINCE WILLIAM SOUND OIL TANKER CONTINGENCY PLAN APPEAL

Superior Judge John Reese dismissed Tom Copeland's remaining challenges to DEC's actions on its approvals of the 1995 Prince William Sound Tanker contingency plans (C-plans). Judge Reese found Copeland's challenges to be moot since the 1995 C-plans had been superceded by new C-plans approved in November 1999 which Copeland did not challenge through an adjudicatory hearing request or administrative appeal. In May, Judge Reese rejected Copeland's claims that he had been denied a fair adjudicatory hearing before independent hearing officer Robert Johnson. Copeland has appealed to the Alaska Supreme Court. AAG Breck Tostevin represents DEC in the case.

FRAUD AND EMOTIONAL DISTRESS OF ADJUDICATION COMPLAINT DISMISSED

Pro se litigant Tom Lakosh filed both an administrative appeal and a separate complaint against DEC and oil shipping companies concerning DEC's action approving the relocation of an oil spill response barge during the winter months from one island to another in southern Prince William Sound. DEC filed a motion to dismiss the complaint as duplicative of the administrative appeal and because Lakosh's complaint failed to state an independent cause of action for, among other things, punitive damages as a private attorney general and emotional distress damages for his pursuing administrative and judicial actions against the state. Judge Gonzalez agreed and dismissed Lakosh's complaint. AAG Breck Tostevin represented DEC in the action.

CRUISE LINES AIR VIOLATION SETTLEMENTS

On November 15, the Departments of Law and Environmental Conservation announced settlements with a number of cruise lines for violations of air opacity standards in the 2000 and 2001 seasons. The settlements were for a total of $402,500 in cash and $175,000 in suspended penalties, the latter to be converted into cash if certain vessels have any violations in 2002. In general, the settlements hold to the principle that each provable violation should yield a civil penalty of $27,500, a much higher figure than has been collected in the past. Both agencies believe the opacity monitoring program has spurred the industry to make both technological and operational improvements and is producing dramatic results. We expect the 2002 season to show even fewer violations. AAG Chris Kennedy coordinated the negotiations with the seven cruise lines, assisted by AAGs Shannon O'Fallon, Elise Hsieh, and Sara Trent.

CLEANUP OF ADAK ISLAND

On December 11, a team of agencies working on the cleanup of Adak Island agreed on a Record of Decision to govern the removal of unexploded ordnance from most areas of the island. This agreement is the most significant step in a decade-long process of negotiations and, at times, confrontation with the U.S. Navy and other agencies in an effort to prepare the island for transfer to private ownership. AAGs Chris Kennedy, Alex Swiderski, Elise Hsieh, and Breck Tostevin have worked on portions of the Adak project.

Fair Business Practices

BOARD OF NURSING SETTLES SITKA CNA CASE

On November 16, 2001, the Board of Nursing adopted an amended memorandum of agreement (MOA) which settled a disciplinary action brought by the Division of Occupational Licensing against a Sitka certified nurse aide (CNA) due to her breach of a previous MOA. The original MOA was based on the CNA's failure to disclose two DWI convictions on her

application for certification, and required her to pay a $2,000 fine ($1,500 of which would be stayed). When the CNA failed to pay the unstayed fine amount of $500 within the prescribed 120-day period, the division invoked the automatic suspension provision of the MOA and the CNA requested a hearing on the suspension. The amended MOA provides that, upon payment of $2,000, the suspension (which has already lasted more than a year) will be lifted and her certificate will be reinstated. AAG Robert Auth represented the division in the disciplinary proceeding and negotiated the settlement with the CNA's attorney.

REGULATORY COMMISSION OF ALASKA

AAG Zobel represented the Public Advocacy Section of the RCA in an administrative hearing before the commission on the price of gas from ML&P's interest in the Beluga Gas Field.

Judge Reese affirmed the decision of the Regulatory Commission of Alaska to terminate ACS subsidiary phone companies' exemptions from arbitration under the 1996 Telecommunications Act. The termination of this exemption was a major step in implementing local phone competition in Juneau and Fairbanks.

BUYING CLUBS CONSUMER FRAUD CASE SETTLED

The State of Alaska, along with a number of other states and the Federal Trade Commission, entered into an agreement with a group of buying clubs located out of Boca Raton, Florida, settling charges that they deceived consumers into purchasing club memberships. The civil complaint, filed simultaneous with the settlement, alleged that Triad Discount Buying Service, Inc. and related companies, deceptively signed up buying club members through third-party marketers. The complaint alleged that an individual calling in response to a television commercial for a particular product would be told that in addition to their purchase they could receive a free, 30-day membership in a buying club. Once consumers agreed to have the membership materials sent to them, and even in many instances when they did not agree, their names and credit cards were provided by the third party companies to the Triad companies. Within 45 days the Triad companies charged membership fees to the consumers' credit cards without their knowledge or authorization. Under the settlement, injunctive relief was entered against the defendants drastically revising their marketing practices to avoid future similar deceptions. Individuals who filed complaints against the Triad companies may be eligible for partial membership refunds.

STATE JOINS IN ANTITRUST SUIT AGAINST DRUG MANUFACTURER

Alaska, along with 29 other states and Puerto Rico, filed a complaint against the Bristol-Myers Squibb company ("BMS") alleging that BMS engaged in antitrust violations relating to the manner in which it applied for and received certain patents to the anti-anxiety drug Buspar. As a result of this conduct, the complaint alleges BMS was able to maintain monopoly prices for Buspar, despite the fact that much cheaper generic versions of the drug were ready to be sold in the market. The complaint seeks injunctive relief, restitution to consumers, and penalties.

STATE SETTLES WITH BRIDGESTONE/FIRESTONE

All 50 states, including Alaska, reached a settlement with Bridgestone/Firestone Inc. ("B/F") to resolve an investigation into allegations that B/F committed unfair and deceptive trade practices in the production, marketing, and sale of several defective tires. The settlement requires B/F to continue its recall program, establish a procedure for consumers to challenge tire replacement decisions, provide clearer disclosures on its

tires related to recommended tire pressures, and refrain from other conduct identified by the states' Attorneys General. Each state also received a payment of $500,000 plus costs and attorney's fees.

STATE SETTLES WITH WORTHINGTON FORD

The state and Worthington Ford ("W/F") entered a settlement to resolve an investigation into alleged deceptive advertising and sales practices by Worthington Ford, Inc. The state's investigation targeted W/F's practice of advertising vehicles at a certain price, but then failing to notify customers of the advertised price. The settlement requires W/F to audit its records for two prior years and pay restitution to customers who were charged more for a vehicle than the vehicle's then currently advertised sale price. W/F will also make a voluntary payment to the state of $160,000 for use toward consumer protection, education, and enforcement.

Governmental Affairs

STATE WINS ROUND ONE OF SAME-SEX BENEFITS LITIGATION

The state and its co-defendant, the Municipality of Anchorage, won round one of the litigation challenging the statutes and policies that allow the spouses of state and MOA employees to share in the employee's benefits (most important, health coverage), but do not allow an employee's same-sex partner to share in these benefits. The litigation was brought by the Alaska Civil Liberties Union and several same-sex couples where one or both partners was a state or MOA employee or retiree. The Anchorage Superior Court granted the state's and MOA's motions for summary judgment, concluding that the statutes and policies did not violate any Alaska constitutional right of either partner in the couple. The plaintiffs have filed their notice of appeal to the Alaska Supreme Court. The state is represented by AAG John Gaguine.

ALASKA SUPREME COURT DECLINES TO REVIEW DECISION VOIDING INITIATIVE PETITION SUMMARY

In 1999 Lieutenant Governor Fran Ulmer, with the assistance of the Department of Law, prepared a summary of a proposed initiative that would have increased the state's liquor taxes. The summary was prepared for the petitions on which the initiative sponsors had to gather the requisite number of signatures. Three sales and entertainment associations challenged the summary, and the superior court found it to be inaccurate and incomplete. The state appealed the ruling, but, while the appeal was pending, the one-year period for the gathering of signatures ended without the sponsors submitting their petitions. The Alaska Supreme Court therefore dismissed the appeal as moot. It rejected several arguments by the state that the matter was not moot, or that, if it was moot, the court should nevertheless decide the appeal to give Ulmer and future lieutenant governors guidance in the preparation of initiative petition summaries. The state was represented by AAG John Gaguine.

SETTLEMENT REACHED IN CORRECTIONS CASE

We settled the wrongful-discharge claims of a former clinical director for the Department of Corrections. The plaintiff had worked for the department for only three months before his discharge, but claimed that the department terminated his employment because he had raised questions about the effects of planned staffing cuts. The plaintiff asserted various claims – including claims under the Alaska Whistleblower Act – against the department and four administrators. Trial of the case had been scheduled to begin February 11.

DIVISION OF ELECTIONS WINS IN STATE COURT, DEFEATING PLAINTIFF'S MOTION TO VACATE JUDGMENT AND FOR ATTORNEY'S FEES

Over the past five years there has been litigation in state and federal court in which certain political parties and individuals have sued the state over Alaska's former blanket primary election. The state division of elections prevailed in this litigation in both state and federal court, upholding the blanket primary. However, in June 2000, the United States Supreme Court issued a decision in *California Democratic Party v. Jones*, and this decision forced Alaska to change its primary election law. Although Alaska was not directly involved in the Jones case, the decision in this case essentially invalidated our primary election law. As a result, the state adopted emergency regulations for the August 2000 primary election, which were challenged, and then upheld by the Alaska Supreme Court.

Last year, the legislature adopted a bill to bring Alaska's primary election law into compliance with *Jones*. Nearly a year after the *Jones* decision the losing parties in Alaska's earlier federal litigation on the primary election brought a motion for relief from judgment, arguing that they were entitled to relief because of the *Jones* decision. We reported in July that we had successfully opposed that motion in federal district court, and that the plaintiffs had filed an appeal to the 9th Circuit Court of Appeals. That appeal is still pending.

Subsequently, in September 2001, the same losing parties also filed a motion to vacate and for attorney's fees with the Alaska Supreme Court, in the state court litigation concerning Alaska's primary election. The plaintiffs argued that the earlier Alaska Supreme Court decision upholding Alaska's blanket primary election should be vacated and that the plaintiffs should receive an award of attorney's fees as the prevailing party. We successfully opposed that motion. The plaintiffs moved for reconsideration on December 12, 2000. The Alaska Supreme Court has not responded to this motion. This case is being handled by AAG Sarah Felix.

Legislation/Regulations

MAJOR REGULATIONS PROJECTS APPROVED FOR FILING

During November and December, the Legislation and Regulations Section was very busy reviewing regulations that needed to be effective before the January1, 2002. Topics included charitable gaming, coin-operated gaming devices and punchcards, oil and gas production tax transportation allowances, oil and gas reserves and petroleum tax, permanent fund dividends, insurance investments of a domestic insurer, Department of Environmental Conservation's permit by rule for portable oil and gas operations, and a variety of occupational licensing projects.

The section completed reviews on procedure for location of mining claims (Department of Natural Resources); regulation addressing slow-moving vehicles on the right side of road (Department of Public Safety); standards for construction contractors and mechanical administrators, continuing education for pharmacy technicians, and permits for chiropractors (Department of Community and Economic Development); weights and measures regulations, and regulations for memorial signs for fatally injured accident victims (Department of Transportation and Public Facilities); waste water fees (Department of Environmental Conservation); and regulations addressing Chignik fisheries, aquatic farms, and shooting range fees (Department of Fish and Game) regulations. The section appreciated everyone's cooperation in meeting target dates on these important projects.

2002 LEGISLATIVE SESSION PREPARATION

The section worked closely with the office of management and budget to process the operating, capital, and mental health budgets for public release before December 15, as required by statute. The section also edited proposals for the governor's consideration.

Natural Resources

REPORT RECOMMENDS DENIAL OF INTERVENTION MOTION

Alaska v. U.S. (Southeast marine submerged lands case), U.S. Supreme Court Original no. 128. Earlier this year, two individuals and two communities sought to intervene in the original action in which Alaska has sued the United States in order to quiet title between the two sovereigns. The proposed intervenors did not claim any interest in title to the submerged lands, but instead asserted to have an interest in the action based on their interest in harvesting herring roe on kelp in the marine waters of the Tongass National Forest. The intervenors wished to support the position that the U.S. had title to the submerged lands because the result of U.S. title would be that the U.S. would have authority to regulate the customary trade and barter of herring roe on kelp harvested by the rural users as subsistence uses on public lands under ANILCA.

The motion was filed with the U.S. Supreme Court, which referred the matter to the Special Master for his recommendation. The parties provided extensive briefing and presented oral argument on the motion. Both the United States and the State of Alaska opposed intervention by these private parties based on well-established case law specific to original actions. Under the rule from *New York v. New Jersey*, private parties are not allowed to intervene in original actions unless they have a compelling interest in the matter in their own right that is not properly represented by the sovereign. This rule is founded upon the *parens patriae* doctrine, under which the sovereign parties are presumed to represent the interests of all their citizens.

The Special Master issued a deliberate and thoughtful report in which he concluded that the proposed intervenors could not overcome the presumption of the *New Jersey* rule and had not provided sufficient reason for dispensing with it. As a result, the Special Master has recommended to the Supreme Court that intervention be denied. The Supreme Court has not yet acted on the matter.

COOK INLET BELUGA WHALE LITIGATION

Litigation continues over the July 2000 decision not to add Cook Inlet beluga whales to the state's list of endangered species. In December, Judge Tan resolved a discovery dispute largely in favor of the state, upholding the state's assertion of the deliberative process privilege. The plaintiffs have now submitted a motion for summary judgment on all issues, and the state will file its opposition and cross-motion for summary judgment in January.

Oil, Gas, & Mining

OIL AND GAS PRODUCTION TAX REGULATIONS

At the end of November, a lengthy packet of oil and gas production tax regulations was filed with the Lieutenant Governor's Office. The Anchorage Oil, Gas & Mining section, along with Steve Weaver from the Juneau Legislation and Regulations section, worked with the Department of Revenue for over a year in researching many technical accounting and legal issues, and the resulting regulations are easier to apply and more clear for the oil and

gas companies who use them. They went into effect on January 1, 2002.

ALASKA PETROLEUM PRODUCTS PRICING INVESTIGATION

The Anchorage Oil, Gas & Mining section prepared an "Update and Status" report on the Alaska Petroleum Products Pricing Investigation. The report was posted on the Department of Law's web page on December 21, 2001.

The Attorney General began an investigation of Alaska petroleum prices in 1999 by issuing civil investigative demands to petroleum refiners and product distributors. The investigation was begun because of public complaints and inquiries to the Attorney General about the high price of gasoline in Alaska compared to other states. The purpose of the investigation is to determine whether Alaska petroleum product pricing is the product of illegal price fixing or other anti-competitive behavior in violation of state or federal statutes. The investigation is ongoing, and no determination has been made regarding whether there is sufficient evidence to warrant bringing an antitrust or other enforcement action.

The on-line report includes background information on the investigation, a brief explanation of possible causes of price differences between Alaska and the Lower 48, and a discussion of the highly concentrated nature of Alaska's gasoline industry. It also discusses what might constitute illegal behavior under Alaska's antitrust laws.

UNITIZATION CASE DECIDED

We assisted the Alaska Oil and Gas Conservation Commission in hearing a petition to order expansion of the North Cook Inlet Unit. The petition was brought by overriding royalty interest owners in nearby tracts who claimed that unit production was draining gas from the tracts. Following six days of hearings earlier in the year, the commission issued a decision denying the petition on the merits.

TAX LIABILITY CASE SETTLED

The State of Alaska and an oil and gas corporation resolved a corporate income tax case concerning the company's outstanding corporate income tax liability for tax years 1993-1997. Under the terms of the agreement, the company agreed to pay $7.95 million in additional tax and interest. The funds were deposited in the Constitutional Budget Reserve. AAG Tina Kobayashi assisted the Department of Revenue in this case.

DNR AND TESORO SETTLE ROYALTY-IN-KIND DISAGREEMENT

DNR and Tesoro have settled a longstanding dispute about a price adjustment for royalty-in-kind oil purchased by Tesoro in 1984 and 1985. DNR's price adjustment claim was triggered by an intrastate tariff refund Tesoro received from Cook Inlet Pipe Line Company in 1994. Tesoro has paid $425,000 to settle the dispute. Because the settlement was achieved after DNR invoked a formal administrative dispute resolution proceeding under the royalty-in-kind sale agreement, the bulk of the settlement payment has been distributed to the Constitutional Budget Reserve Fund. A number of assistant attorneys general have worked on this matter over the years, including Mike Barnhill and Jan Levy. AAG Virginia Ragle negotiated the settlement.

Special Litigation

BOUNTY HUNTER CLAIMS DISMISSED

Based on three dispositive motions, the federal court dismissed claims brought by several bounty hunters against state prosecutors and law enforcement officers. The lawsuit arose out of the state's prosecution of the bounty hunters for kidnapping and assault after they

armed themselves and entered the home of a third party to make an arrest. The bounty hunters claimed that they were prosecuted in violation of the 4th Amendment and equal protection clauses.

Federal District Court Judge Holland ruled that the state defendants were protected by qualified immunity on the Fourth Amendment claim and absolute immunity on the equal protection claim. The tort portion of this case was handled by AAG Stephanie Galbraith. Because there were also employment law issues in the case, AAG Jan DeYoung of the Governmental Affairs section was co-counsel and assisted on tort aspects of the case as well.

COURT SAYS NO TROOPER NEGLIGENCE

Also in December, the Alaska Supreme Court affirmed on appeal dismissal of a negligence claim against the troopers for failing to serve an outstanding arrest warrant on an unsupervised parolee. The parolee drove drunk and killed a child. The court held there is no legal duty to serve a warrant. The decision of when to serve a warrant is a fundamental aspect of police discretion and imposition of such a duty would burden the police too heavily. Notably, the court broadened precedent that police cannot be sued for a negligent investigation to include this case. This case was defended by AAG Stephanie Galbraith.

SEARCH AND RESCUE QUESTIONS ARGUED

On December 10, 2001, AAG Venable Vermont argued the state's appeal in the Alaska Supreme Court in *Kiokun v. State*. The primary issue, which raised a number of questions from all of the justices, was whether the state troopers have an actionable duty to initiate search and rescue operations. There were many lesser issues, including discretionary function immunity, and tort-reform-related issues having to do with damages and the applicability of caps to wrongful death claims. The case arose out of the deaths of three members of the Olrun family on the Denali Highway in January, 1995.

OPA IMMUNITY

On December 13, 2001, Venable Vermont argued before the Alaska Supreme Court for the State, Office of Public Advocacy, as appellee in *Trapp v. State*. The issue was whether OPA employees are entitled to quasi-judicial immunity for their acts as court-appointed conservators. Judge Michalski had granted a motion to dismiss on the basis of *Lythgoe v. Guinn*, an Alaska case that provided quasi-judicial immunity for court-appointed psychologists.

Transportation

AAG Tom Dillon participated as a panelist at the 16th Annual Public Construction Superconference in San Francisco.

Criminal Division

ANCHORAGE

Lloyd Pennebaker, 36 years old, was charged with sexual assault of a minor in the second degree for having sexual relations with a 13-year-old girl. He met the girl on-line. He was also charged with burglary in the first degree and misconduct involving a weapon in the fifth degree for entering into the house of an 18-year-old girl, whom he had also met on-line. He was caught by the girl's mother. The mother yelled for her husband, who came and held Pennebaker until police arrived. He was wearing a mask and dark clothing and carrying a 9 mm semiautomatic handgun.

Russell Carlson, driving with a .24 blood alcohol, struck and killed a vacationing college student bicycling on Minnesota Drive. Carlson had seven previous drunken driving convictions. He was speeding and weaving down the road when he collided with another vehicle before he jumped the curb and struck the bicyclist. The truck continued into the adjacent parking lot and crashed into three parked vehicles. Carlson pled to murder in the second degree and DWI and was sentenced to 15 years in jail.

Carl Merculief was indicted by a grand jury for murder in the first degree, two counts of murder in the second degree, two counts of burglary in the first degree, two counts of assault in the third degree, and misconduct involving a weapon in the third degree. He has been accused of shooting to death a U.S. Coast Guard officer on St. Paul Island. Merculief believed his estranged wife was having an affair with the officer. He went to the Coast Guard facility, where he beat the officer before shooting him several times. Merculief then went to his wife's house, confronted her, and assaulted her. This month, a judge ruled that the trial will be held in St. Paul. The population of St Paul is 300-400 adults; however, it may not be able to produce enough impartial jurors for this case. Trial was continued to mid-July 2002, when the Island Hotel will re-open.

Franklin Schug was convicted by a jury of assault in the first, second, and third degrees, as well as misdemeanor counts of failure to render assistance, driving with license revoked, and DWI. Schug came out of a side street, struck two of three motorcycles with his truck, and then fled the scene. The third motorcyclist, who escaped being hit by the truck, checked on the injured and then chased the truck. Schug failed to slow down. However, the cyclist managed to hop on the truck and take the keys out of the ignition. Other by-standers aided the motorcyclist in holding Schug until police arrived. Schug's breath alcohol level was .229 when tested an hour after the collision. The state's expert estimated that Schug had consumed at least 18 drinks before driving that evening. Schug has five previous DWI convictions.

The grand jury heard evidence concerning the disappearance and murder of Tawni Williams. Williams' body was found buried in Wasilla in August 2001. The grand jury charged Antonio Garrison and Curtis Kragero with murder, conspiracy to commit murder, evidence tampering, theft, and hindering prosecution.

Solomon Garcia was indicted for the death of his friend, who was shot in the back of the head. His friend was sitting in the passenger front seat of a car and Garcia sat behind him. Garcia told police he was playing with a gun and it went off. The friend was taken to the hospital and died of his injury a few days later. Garcia is charged with manslaughter.

Samuel Camanga was sentenced to 99 years in jail, with 24 years suspended, and 10 years probation for the shooting death of Frances Wolfgang Gorsche. In September 1999, a moose hunter along the Eklutna Lake Road discovered the body of a young Native male. The male, Gorsche, had been shot in the head. Samuel Camanga, Shane Clapper, and Paul Munson were charged with murder in the first degree. Camanga told police that he shot Gorsche because he had been told that Gorsche had abused a young girl. Camanga's co-defendants are still awaiting trial, which is scheduled for March 2002.

Louie Crandall was charged with murder in the first degree for the drowning death of Wassille "Gabe" Jost. In 1997, Crandall accused Jost of molesting Crandall's two-year-old daughter. No charges were filed. In 1998, Crandall confronted Jost about the molesting, though Jost denied it. In 1999, police found the body of Jost in a local lake. Investigation revealed that Crandall came home soaking wet the night Jost disappeared. Crandall confessed to a family member that he held Jost under the

water and then filled his clothing with rocks so he would sink.

BARROW

A robbery trial ended with a hung jury. Another jury found a defendant guilty of a DV felony assault

Two defendants plead out, one to felony DWI and the other to evidence tampering. The grand jury indicted one defendant for forgery, one for possession of methamphetamine, and another for sexual assault.

One defendant plead to incest, and another to felony DWI. The grand jury returned indictments against a defendant for possession of methamphetamine, another for felony DWI, and still another for burglary and theft. The grand jury declined to indict one defendant for breaking the windows out of a truck owned by the North Slope Borough.

BETHEL

Nick Nicholi was convicted of sexual assault in the second degree and violation of conditions of release after a jury trial. Christopher Alexie was found not guilty of DWI after a jury trial. Johnny Sakar was found not guilty of assault in the fourth degree after a jury trial in Aniak.

David David's trial for sexual assault in the first degree resulted in a hung jury. He will be retried.

The Bethel grand jury returned indictments on the following cases: Brian Laraux – vehicle theft in the first degree. Galen Kelly – sexual assault in the second degree. Dietrich Mael – 2 counts sexual assault in the second degree. Terry Workman – leaving the scene of an injury accident and 2 counts of assault in the third degree. Henry Walter – 2 counts of assault in the third degree. Evan Smith – sexual assault in the first degree and 1 count sexual assault in the second degree. Harry Mezak – assault in the third degree. Roland Johnson – sexual assault in the first degree and 2 counts of sexual abuse of a minor in the second degree. Kevin Burkett – assault in the third degree. Alfred Wassillie – manslaughter. James Peter – robbery in the second degree. Jeffrey Black – burglary in the first degree. Priscilla Stafford – misconduct involving a controlled substance in the fourth degree.

Joseph Ashepak was convicted of sexual assault in the first degree following a jury trial. Stanley Vaska was sentenced to 30 years with 10 years suspended and 10 years probation for sexual abuse of a minor in the first degree following his retrial. This was the sentence that was originally imposed.

Approximately 20 indictments were returned against various defendants.

FAIRBANKS

DA Harry Davis retired at the end of the month after 30 years of state service, 26 of those as District Attorney. Harry led the office through the Pipeline chaos, institution of the new criminal code, and many other crises, large and small. He tutored and mentored many attorneys over those years, including two current members of the Court of Appeals and five other sitting judges. He intends to molest fish during his retirement.

The Fairbanks City Council has repealed its DV assault ordinance, effective January 1, 2002. The Fairbanks DAO expects approximately 300 new cases annually.

A UAF student was indicted for two counts of kidnapping and a sexual assault and two physical assaults against his ex-girlfriend. The victim did not report the first kidnapping to police, but testified about it at a DV hearing before a local judicial officer. The defendant, who was present at the hearing, admitted under oath that he did restrain, tie up, and rape the victim, but said he was getting counseling and would not do it again. The judicial officer granted the DV order, but did not report any of

the testimony to law enforcement, and the defendant abducted the victim again that same evening.

A felon with parole and probation warrants outstanding attempted to burglarize a residence near Fairbanks. He fired at the responding trooper with a sawed-off shotgun and was hit by return fire. He then ran off into the woods, leaving behind his shoes, and was not found and apprehended for over an hour. Besides his gunshot wound, he suffered severe frostbite, since the temperature was around -30°F. He remains in the hospital on parole and probation holds, awaiting the filing of new criminal charges.

Retiring District Attorney Harry Davis's "surprise" party was a rousing success. Deputy AG Cindy Cooper first made appropriate remarks and then read a poem composed by Chief Assistant Attorney General Dean Guaneli. AAG Mike McLaughlin followed with colorful reminiscences. ADAs Dave Burglin and Jeff O'Bryant presented high-quality gifts from the shelves of K-Mart. Barrow ADA Mary Fischer contributed an autographed Pepe's of the North T-shirt. Teri Foster gave Harry his real gifts, matching prints of the Tanana Flats, where Harry has made many futile attempts to catch monster graying and pike. AAG Karla Welch and two backup singers intermittently led the crowd in modified Christmas songs memorializing Harry's humanitarian and rehabilitative accomplishments while District Attorney.

KENAI

Kenneth Bingaman was sentenced to a composite term of 23 years, with 14 suspended and placed on probation for 10 years. Bingaman was convicted of three counts of sexual abuse of a minor and one count of assault in the third degree arising from the 1995/96 violence perpetrated on a mother and daughter over whom Bingaman exercised control for about three years. It has taken immeasurable time to get this case to trial after the trial judge initially would not allow 404(b)(4) evidence before the jury. The court of appeals reversed this ruling, holding that an individual did not have to be convicted in order to use bad act evidence under the rule. At trial two former girlfriends testified about numerous acts of domestic violence on them over approximately a 20-year period.

The prosecutors tried approximately 15 misdemeanor cases. The charges included DWIs, thefts, failures to appear, assaults and other driving offenses.

The Kenai grand jury indicted an 18-year-old for his action in numerous burglaries in the Seward area. He had entered several residences and stolen cash, alcohol, jewelry, computer, guns, and a vehicle.

KETCHIKAN

The sole jury trial this month ended in a not guilty verdict. Robert Lewis was accused of assaulting his girlfriend, but the jury believed his claim that he was acting in self-defense.

Troy Smart was indicted for assault in the second degree and tampering with physical evidence. The airport police in Ketchikan got word that Smart was carrying heroin and that the person he took the heroin from might come to the airport and cause problems. The airport police asked the troopers to help. AST Sgt. Lonnie Piscoya went to the airport and contacted Smart and Smart's wife. They agreed to a search. In the bottom of Smart's shoe, Sgt. Piscoya found a bag of black tar substance that he believed was heroin. Smart jumped the trooper, breaking the trooper's leg. He then grabbed the bag and began to eat the heroin. Sgt. Piscoya, an airport police officer, and a National Guardsman on duty at the airport were finally able to subdue Smart but only after he ate the bag. Several weeks before, Smart had been contacted by another trooper and was found with some powder that was later tested as being methamphetamine. This resulted in a charge of misconduct

involving a controlled substance in the fourth degree.

The police got a tip that Chuck Burns had a large amount of methamphetamine, and they knew his driver's license was revoked. When they saw him driving down the street they stopped him and arrested him for DWLR. Search warrants produced a large amount of methamphetamine in his car. They also searched his house and found packaging materials and records of drug deals. Burns was indicted for misconduct involving controlled substance in the third degree.

Others were indicted for felony DWI, misconduct involving controlled substance in the fourth degree, vehicle theft in the first degree, eluding police, and burglary in the first degree.

There were three felony trials and three misdemeanor trials. Eddie Rowe was convicted of three charges of third-degree misconduct involving controlled substance for selling methamphetamine to an undercover informant. He denied selling any drugs. The tape of the drug sells was not too good because they took place in a bar where the background noise made it hard to hear. Brian Gilson was found not guilty of sexual assault in the first degree against his ex-girlfriend. Shaun Whitesides was convicted of second-degree misconduct involving a controlled substance for selling heroin to another person who then overdosed on the heroin and died.

Kris Antonsen was convicted of assault in the fourth degree against his wife for scaring her when he grabbed a PVC pipe and swung it around, breaking a number of objects in the room. The wife recanted, but her statement to the police was played at trial showing that she was still upset and afraid when they interviewed her. Marvin McCloud was convicted of three counts of violating a domestic violence protective order. Tami Linne was found not guilty of assault in the fourth degree but was found guilty of disorderly conduct and harassment.

On Christmas Day, a Ketchikan man was found murdered in his yard; he had been badly beaten. His body was found about one block from the police station. This was the fourth murder in Ketchikan this year. No one has been charged in his death.

Anthony Charles was indicted for assault in the first degree. He got upset with his brother, took a knife, and cut his brother's throat. The cut was not deep. He was originally charged with attempted murder as well as assault in the first degree, but the grand jury only indicted on the assault charge. Five different persons were indicted on misconduct involving controlled substance in the fourth degree for possessing methamphetamine or cocaine. Others were indicted for sexual abuse of a minor in the second degree, felony furnishing alcohol to minor, failure to stop at direction of police officer, and burglary.

KODIAK

The office brought to trial the notorious "black box" case, in which one of the local cannery workers was said to be selling cable boxes that would allow free reception of all GCI cable services, including Pay Per View events. Local police went to the suspect's home early in the day (having received a Crimestopper's report) and announced they were looking for "Pedro." Pedro's "significant other" claimed that he wasn't home. When they came back later that night, Pedro was there, but by that time the illegal cable boxes were gone. All the boxes--that is--except the one Pedro himself was using, which was still connected to his TV. The jury convicted the defendant for theft of services, even though considerable resentment was expressed during voir dire, when jurors complained that cable TV costs are higher than they should be in Kodiak. The defendant's immigration lawyer was concerned about the theft conviction and contacted defense counsel to ask if the local INS officer was aware of the

conviction. The lawyer's composure was upset when he found out that not only did the local INS officer know about the conviction, but had in fact testified at trial on the topic of the defendant's ability to communicate in the English language.

A 34-year-old Kodiak man was sentenced to 5 years in prison, with half of that suspended, upon his conviction for theft in the second degree, a class C felony. This defendant had been arrested in September following an investigation by the Kodiak Police Department into numerous boat break-ins at the boat harbor. The man was also ordered to pay a $10,000 fine and was placed on probation for 5 years.

One week in advance of trial, a 36-year-old Kodiak woman plead to misconduct involving a controlled substance in the fourth degree, a class C felony, for selling marijuana to another person. Sentencing has been set for January. Additionally, the grand jury indicted five other Kodiak residents for drug felonies, including three for felony misconduct involving a controlled substance in the second degree, a class A felony.

A 25-year-old Kodiak man was indicted for sexual abuse of a minor in the first degree. Charges were referred after the father of a 15-year-old minor caught the defendant in his daughter’s room, where the defendant had been residing for at least 36 hours.

Wishing to evade detection for consuming alcohol in violation of her conditions of release in a pending domestic assault, a woman fled from the police. She led a parade of six police cars from one end of town to the other, and back. The police chief called off the chase after the defendant had been positively identified by one of the responding police officers . . . as she came within inches of hitting him with her car. The defendant was later found hiding in the closet of her sister's bedroom after the police found her car in front of her sister's house. Rather than merely facing two new misdemeanor charges for driving while intoxicated and violating her conditions of release, this defendant is now facing the additional charges of felony failure to stop at the direction of a police office, felony assault in the third degree, reckless driving, and reckless endangerment.

A resident of Hawaii was arrested at a local motel and charged with misconduct involving a controlled substance in the third degree, a class B felony. When the defendant and his motel room were searched, the police found a gram of cocaine and nearly $2,000 on his person, in addition to two ounces of cocaine, a digital gram scale, and cocaine packaging materials in his motel room. Partially discarded packaging materials would indicate that the man had already packaged seventeen gram-packages of cocaine during the brief 36-hour period he had been in Kodiak.

A Kodiak man with no prior criminal history was sentenced to 36 months with 30 months suspended and placed on probation for 5 years following his plea to B felony assault in the second degree. The defendant had stabbed another male who had come uninvited to his birthday party. While the defendant did not have a claim for self-defense, which would have justified the use of deadly force, the court agreed that the defendant's conduct was still mitigated in that the victim had come to the defendant's home uninvited and had significantly provoked the defendant's conduct.

KOTZEBUE

After seven days of trial, a jury convicted Mahlon Uhl, Jr., on all counts including domestic violence assault in the fourth degree, resisting arrest, and misconduct involving a controlled substance in the fourth degree. The defense argued that the Kotzebue police officers did not like the Uhl family, harassed them on numerous occasions, and planted the drugs found by the jail personnel at the time that the defendant was booked. The jury disregarded these arguments and convicted on

all counts after several hours of deliberations. Sentencing in this case is scheduled for February. While Mr. Uhl has prior convictions, this is his first felony conviction.

The new magistrate arrived at the end of November and is expected to assume her duties by the end of December. Her name is Karen Bendler and she comes from Anchorage.

Leroy Adams was charged for attempting to murder his stepfather. The complaint alleges that the defendant strangled his stepfather into unconsciousness. The victim's wife arrived home and saw the defendant on top of the victim. She got the defendant off of her husband, took him outside, and had a neighbor call the police.

Robert Penn was also charged with attempted murder. Mr. Penn was intoxicated and attacked Paul Wesley with an axe in Noatak. Mr. Penn was convicted of assault in the third degree and received a sentence of five years to serve. Another Penn, Joseph Penn, has been charged with sexual assault in the first degree, an offense also occurring in Noatak.

NOME

Three young men from Stebbins were arrested in a plot to kill and rob a storeowner in the village (the victim also happens to be the mayor of Stebbins). The three are alleged to have planned the crime for several days. They met and taped an empty shampoo bottle over the muzzle of a rifle to act as a homemade silencer. One of the co-defendants knocked on the victim's window about 11 p.m. When the victim came to the window, the youngest of the three shot him in the head. The victim has a bullet lodged against his spine, but otherwise is fine. The shooter is 14, and a petition has been filed seeking to waive him into adult court. The other two, a 16-year-old and a 21-year-old, were indicted for attempted murder, conspiracy, first-degree assault, and first-degree robbery.

Other new cases include a domestic assault from Gambell in which the weapon of choice was a four-wheeler and a case from Brevig Mission in which an intoxicated man fired a shotgun into an occupied residence.

Two men were charged with attempting to import alcohol by traveling by boat to the dry village of Kotlik with a substantial (178 bottles of distilled spirits and 6 cases of beer) quantity of alcohol. David Prince's defense (his co-defendant, Anthony Prince, plead out) was that they planned to stop and drink at every village and fish camp along the way and that they weren't taking the alcohol to Kotlik. The jury didn't believe him—he was found guilty. Two separate sexual assault defendants backed out of their no contest pleas at the last minute, so sexual assault cases from Shaktoolik and Unalakleet are back on the trial calendar.

Nome ended the year with a record number of criminal case filings. In addition, the Nome office prosecuted in excess of 400 misdemeanor probation revocations. There was a substantial increase in the number of DWI charges due to a strong enforcement effort by local police.

John Martin was arrested in Stebbins and charged with sexual abuse of a minor. He waived indictment and entered a no contest plea. Shortly after the plea (and well before sentencing), Martin became involved in an altercation with a correctional officer at Anvil Mountain Correctional Center, during which the officer suffered a broken leg. Martin now faces an additional felony assault charge. Another Stebbins resident was arrested in Nome and charged with first-degree burglary and sexual assault after he had entered an occupied apartment, stolen some jewelry, and fondled a sleeping occupant. The defendant ran off when the victim awoke, but was later arrested.

John Vacek traveled to Kotzebue for the sentencing of Steven Cleveland, a case that was tried in September. Cleveland received an aggregate sentence of 19 years to serve on his convictions for sexual assault in the second degree, assault in the second degree, and manufacture of alcohol in a local option village.

PALMER

Three individuals were indicted on sexual assault charges and two on sexual abuse of minor charges.

Seth Joslin was sentenced to six months of jail time and five years probation after pleading to sexual abuse of minor in the third degree. Joslin, while employed as a teacher at Colony High School, developed a sexual relationship with a seventeen-year-old student. Joslin was also a youth leader at the victim's church.

A jury convicted John Sibole of assault in the fourth degree. The victim in the case was Sibole's girlfriend. Sibole hit the victim a number of times after she discovered him in bed with her best friend.

A jury rejected Mark Clemons' (pro per constitutionalist) claim that the constitutional right to travel/locomotion includes the right to drive on Alaska's road and byways without a valid operator's license. Clemons received a five-day flat sentence for driving without a valid operator's license, and, following intense negotiations, Clemons entered a change of plea in a second driving without a valid operator's license case, receiving a second five-day flat sentence, to run consecutively with the first.

Clark Lane was found guilty of driving with a suspended/revoked license, despite the fact that the public defender sprung a necessity defense the morning of trial.

The trial of three defendants on drug charges (a dope grow) resulted in a mistrial based on the defense not having reviewed the voluminous seized paperwork discovery showing that the defense of the owners of the property was untenable. The potential for an eventual ineffective claim may have prompted the court to grant the motion for mistrial.

A Valdez jury could not reach a decision on six counts of sexual assault in the first degree, as charged against Valdez resident James Chavez. The jury did find him not guilty on one count of sexual assault in the first degree. Chavez was charged with seven counts of sexual assault in the first degree, after his girlfriend reported that he raped her over a period of one month. Chavez subsequently pled to reduced charges.

Twenty-six individuals were indicted by the Palmer grand jury in December. Three of these cases involved sexual abuse of a minor, four involved charges of felony DWI, and nine cases were felony assaults. Suzette Welton was re-indicted on charges of first-degree murder, second-degree murder, attempted murder, and arson.

SITKA

Three trials on DWI charges were held. One, a felony DWI charge against Rochelle John, was a re-trial from a hung jury in Angoon. The trial was severed, over objection, so the jury did not hear evidence of her prior DWIs. For the second time, the jury seemed to struggle with the pattern jury instruction and was unable to reach a unanimous verdict.

The second Sitka case involved a defendant who drove her truck over a small boulder so that it was partially hanging over a cliff. Her breath alcohol content was over .20%. She claimed that after she drove she drank a six-pack at a bar that had been closed for business weeks before. Nonetheless, the jurors hung, saying they wanted to hear from an expert witness about whether she could have gotten over a .20% from a six-pack after driving. The

case will be re-tried, with an expert witness, in March.

In the third case, a Petersburg jury found Eric Olson guilty. He was seen exiting the vehicle quickly as the officer approached, and he and his friend played a shell game re: who drove the vehicle off the road, where it was stuck with the tires buried up to the rim from spinning in gravel. They didn't realize it was hung up on a fire hydrant they had run over, and so their efforts to get it out had been futile. Evidence at trial showed his friend did drive it there, but it was Olson who was operating it when the police officer arrived.

Another Petersburg jury convicted Eli Pickett of two counts of sexual assault in the first degree. He testified the victim's rectal injuries could have been from her "eating hot peanuts" for all he knew. He also denied that she was pinned down as he straddled her back, saying she could have swung her leg free and kicked him in the back of the head while lying on her stomach if she really wanted to get free.

OSPA
(Office of Special Prosecutions & Appeals)

Personnel News

Jim Hanley came out of retirement to work at OSPA on a temporary basis, through March 2002. Jim is a 25-year veteran of the criminal division who formerly worked at OSPA and various district attorney offices around the state. Jim's welcome return helps stem the rising tide of cases created by the departure of Eric Johnson.

Steve Branchflower retired on January 4, 2002. Steve started his career with the Department of Law on September 1, 1974. His wife, Linda Branchflower, retired from APD on January 2, 2002. The two of them will travel for a while, but in March they will return to Alaska, where they plan to stay.

Ben Herren departed OSPA for the violent crimes unit of the Anchorage District Attorney's Office. Ros Lockwood joined OSPA from the violent crimes unit.

Don Kitchen, formerly the supervisor of the property unit in the Anchorage District Attorney's Office, has taken over Steve Branchflower's position as the head of the Medicaid fraud unit for OSPA.

Prosecution News

White Water sentenced for criminally negligent homicide. White Water Engineering Corporation was sentenced on one count of criminally negligent homicide. White Water was building a hydroelectric plant near Cordova, in an avalanche zone, and, despite knowledge of the danger, it took inadequate steps to protect its workers from avalanches. Gary Stone died on the work site from an avalanche which White Water could have either prevented or predicted. White Water was sentenced to a fine of $275,000, with $125,000 suspended. White Water was ordered to pay approximately $17,000 in restitution to the victim's family, and it was placed on probation for three years.

Clarkson convicted and sentenced for illegal fishing. Bruce Clarkson was caught commercial fishing in a bay that is never open to salmon fishing. He pleaded no contest to commercial fishing for salmon in a closed area. Clarkson was sentenced to ninety days with ninety days suspended, restitution to Fish & Wildlife Protection of $1,000, a fine of $15,000 with $8,000 suspended, and probation for three years.

Dr. Gottlieb convicted of 234 counts involving Medicaid fraud. After a month-long jury trial, Dr. Gottlieb was convicted of 234 counts including felony level theft, perjury, forgery, and over 150 Class A felony drug charges. Between January 18, 1994, and March 15, 2000, Dr. Gottlieb stole $240,334.95

in public funds from the Alaska Medicaid Program. Dr. Gottlieb also issued scores of prescriptions involving more than a dozen controlled drugs to numerous Medicaid patients over a three-year period without a legitimate medical necessity.

Ahkpuk convicted and sentenced for importation. Jessie Ahkpuk pled no contest to one count of misdemeanor importation of alcohol. A VPSO in Buckland intercepted two bottles of whiskey being sent to Ahkpuk, and he arranged for a controlled delivery. Ahkpuk received a sentence of 180 days with 90 suspended and 2 years of probation.

Lie convicted and sentenced for attempted importation. Janelle Rae Lie pled no contest to attempted importation. Lie was caught with one half-gallon of whiskey that she was trying to take to Shungnak. Judge Erlich sentenced her to 30 days with a $1,000 fine.

Westlake and Andrews convicted and sentenced for attempted importation. Philip Andrew and Theodore Westlake pled no contest, under the old law, to attempted importation. Police in Anchorage caught Westlake attempting to ship 18 bottles of hard alcohol to Andrew, who was in Emmonak. Westlake was given a one-year SIS with the conditions that he pay $2,000 and do 24 hours of community work service. Andrews received a sentence of 360 days with 330 suspended, a fine of $2,000 with $1,000 suspended, and 5 years of probation.

Braden sentenced for theft. Cathy Braden was sentenced on one count of second-degree theft. Braden fraudulently received approximately $3,700 of public assistance by using the name of a deceased person for employment and her own name for benefits. Braden received a sentence of 2 years with 1½ years suspended and restitution of $3,700.

Hamilton sentenced for theft. Sharae Hamilton was sentenced on one count of theft in the second degree. From March 1996 through November 1998 Hamilton received more public assistance than she was entitled to because of her failure to disclose child support payments. Hamilton received a sentence of 12 months with all time suspended, restitution of $12,727, and probation for 4 years.

Petitions & Briefs of Interest

Petitions of Interest

Sex offender registry. The state argues in a petition for certiorari that the United States Supreme Court should review the Ninth Circuit's holding in *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001). In *Doe*, the Ninth Circuit held that Alaska 's sex offender registration statute violated the ex post facto clause with respect to those registrants who committed their offenses prior to the statute's effective date. In the petition, the state asserts that the Ninth Circuit's decision (1) severely limits states' ability to protect the public from sex offenders, (2) conflicts with the Ninth Circuit's and other circuits' decisions upholding similar sex offender registration statutes, and (3) disregards the Alaska Legislature's remedial intent in passing the sex offender registration statute. *Doe v Otte*, No. 01-729.

Post-conviction relief – discovery of defense attorney's file. The state argues in a response to a petition for review that Judge Brown correctly ordered that the prosecutor could have access to the files of the defendant's trial attorney and appellate attorney in a post-conviction relief action where the defendant was claiming the trial and appellate attorneys had given him ineffective assistance of counsel. The state asserts that the defendant waives confidentiality in the files by asserting his attorneys' ineffectiveness, and that any claim that specific documents in the files are protected from disclosure by the privilege against self-incrimination (or any other privilege) must first be made in the trial court. *Samskar v. State*, No. A-8159.

Briefs of Interest

Minor consuming – right to jury trial. The state argues to the Alaska Court of Appeals that a defendant charged as a first offender with "minor consuming alcohol" is not entitled to a jury trial or appointed counsel. In its opening brief, the state asserts that the fact that the defendant could be referred by the sentencing judge to a community diversion panel (e.g., youth court) and that the panel could then require the defendant to do inpatient alcohol treatment or community work service does not trigger the right to a jury trial as a condition of probation. The state also points out that the sanction for violating these probation conditions would be an insignificant fine. *State v. Auliye*, No. A-8084.

Temporary detention. The state argues to the Alaska Supreme Court that police officers responding to a report of a disturbance between a landlady and tenant, and who arrive to find the landlady and tenant still arguing, are justified in briefly detaining the tenant until the police can determine what is going on. In its opening brief, the state asserts that the court of appeals erred in holding that the police should have let the tenant just walk away from the scene (as the tenant tried to do). The state argues that the court of appeals' holding will have an adverse impact on the police investigation of domestic violence cases as well as endanger both officers, victims, and the public. *State v. Jones*, No. S-9967.

Dual representation. The state argues that the trial court's perfunctory inquiry into the fact that the same defense counsel was representing two co-defendant brothers – an inquiry that the prosecutor perceptively remembered needed to take place – was sufficient to satisfy the inquiry required in dual-representation cases by *Moreau v. State*. *Hutchings v. State*, No. A-7946.

Search incident to arrest. The state argues that the police, after arresting a defendant for reckless driving, were authorized to search for weapons in all areas – including the closed center console of the defendant's truck – within the defendant's immediate reach at the time of the arrest. As the police were pursuing the defendant, he appeared to fidget with or move objects around on his lap. *Crawford v. State*, No. A-8082.

Double jeopardy. The state argues that the trial court erred when it concluded that the double jeopardy bar precluded the state's prosecution of a defendant for driving while intoxicated after he had pled to a traffic infraction (negligent driving) arising from the same incident. *State v. Hecks*, A-8165.

Court Decisions of Note - Alaska

Probation conditions – sufficiency of violation. A defendant who as a condition of his probation was prohibited from "living with" females under the age of 16 was held not to violate this condition when the evidence established that he only spent a substantial portion of one night in a house with a female under 16. *Edwards v. State*, Op. No. 1171 (11/9/01).

Probation conditions – modifications. Even where it is not proven that the defendant has violated an express condition of his probation, a court has the authority to modify the conditions if the state proves a significant change of circumstances, i.e., "post-sentencing conduct that establishes a substantial reason to conclude that current conditions of probation are not adequately ensuring the defendant's rehabilitation or protecting the public." In this case, the defendant's perjury during his probation revocation hearing and his encouraging others to lie about his conduct were among the changed circumstances supporting a modification of the defendant's probation conditions. *Edwards v. State*, Op. No. 1171 (11/9/01).

Venue for trial. Under Criminal Rule 18, the presumptive site for a trial is the court location within the venue district that is nearest to the site of the crime and which has facilities for the jury. The site need not have a resident judge. *John v. State*, Op. No. 1772 (11/16/01).

Presentence report - defendant's statements. The incriminating written statements that a defendant gave in response to a presentence report questionnaire were not the product of custodial interrogation, and so Miranda warnings were not required, nor were the statements involuntary. The defendant had argued that he felt compelled to answer the questionnaire because the judge had ordered him to cooperate in the preparation of the presentence report and it was implied that his answers would help his sentence. *John v. State*, Op. No. 1772 (11/16/01).

Presentence report – Evidence Rule 410. The court noted that a split of authority existed as to whether statements made by a defendant in response to a presentence questionnaire would be barred by Evidence Rule 410, which excludes statements made in connection with a plea. (The defendant had filled out the questionnaire and then withdrawn his plea, and the statements he made in response to the questionnaire were later introduced at his trial.) The court did not resolve the issue because the defendant had not preserved it below. *John v. State*, Op. No. 1772 (11/16/01).

Parental consent to abortion – constitutionality. The Alaska Supreme Court reversed the trial court's ruling that a statute requiring minors to obtain parental consent for abortion violated equal protection for not also requiring minors to obtain parental consent to carry a fetus to term. The supreme court concluded that although minors have a constitutional right to reproductive privacy coextensive with that of adults, the trial court had erred in not allowing the state to present evidence of its compelling interests in the parental consent requirement. *State v. Planned Parenthood*, Op. No. 5499 (11/16/01).

Probable cause to search - marijuana grow. A search warrant based on a single officer smelling growing marijuana coming from a residence, combined with another circumstance corroborating the presence of a marijuana grow – in this case, high electrical usage – furnished probable cause to search the residence. *Lustig v. State*, Op. No. 1773 (Alaska App., 11/23/01).

Probable cause to search – officer's experience. Testimony of an officer that he had smelled growing marijuana could be relied upon for probable cause when the officer had prior experience smelling growing marijuana and had discovered other marijuana grows based on his sense of smell. *Lustig v. State*, Op. No. 1773 (Alaska App., 11/23/01).

Rule 45 – resetting of the clock. The Rule 45 clock resets when (1) the defendant intentionally fails to appear for court, (2) the defendant is thereafter absent for a substantial period of time – in this case, four-and-a-half months, and (3) no substantial progress is made in the normal pretrial process before the defendant disappears. *Gottschalk v. State*, Op. No. 1774 (11/23/01).

Voir dire – *Batson v. Kentucky*. *Batson v. Kentucky* prohibits using peremptory challenges in a racially discriminatory manner. Under Batson, the prosecutor's reason for a peremptory challenge of a potential juror need not rise to the level of a challenge for cause; it need only be a race-neutral reason. If the prosecutor provides a race-neutral reason, then it becomes the court's duty to determine whether the reason is the prosecutor's true reason or is a sham (i.e., a reason provided to mask the prosecutor's discriminatory intent). *Gottschalk v. State*, Op. No. 1774 (11/23/01).

Voir dire – Batson motions. A defendant bringing a Batson motion has the burden of persuading the court that the prosecutor's

articulated reason is a sham. *Gottschalk v. State*, Op. No. 1774 (11/23/01).

Voir dire – Batson motions. A prosecutor's race-neutral reason that has a disproportionate impact on members of an identified racial group does not constitute unlawful discrimination: Batson prohibits only intentional discrimination, not disparate impacts. *Gottschalk v. State*, Op. No. 1774 (11/23/01).

Expert opinion testimony – what constitutes it. In an unpublished memorandum opinion, a concurring judge explained that a witness offers lay opinion if the opinion rests on personal observation and a process of reasoning familiar in everyday life; a witness offers expert opinion, on the other hand, if the witness's conclusions rest on specialized knowledge or a process of reasoning which can be mastered only by a specialist in the field. Thus, a police officer was not offering expert testimony when he testified about comparing indentations on a seat cover with the nose of a gun that he thought might have made the indentations. *Hall v. State*, Mem. Op. No. 4505 (11/28/01).

The following two cases are memorandum opinions and cannot be cited. They are included for informational purposes only.

Confessions – voluntariness. In an unpublished memorandum opinion, the court of appeals ruled that an officer who described for the defendant a scenario which suggested to the defendant that his cooperation might work to his benefit had not induced the defendant's confession through a threat. The court said that the fact that a benefit might flow from cooperation is not the equivalent of a threat of harsher treatment in the event of non-cooperation. *State v. Munson*, Mem. Op. No. 4494 (11/21/01).

Miranda rights – ambiguous invocation of right to remain silent. In an unpublished memorandum opinion, the court of appeals said that an officer was not under an obligation to clarify a suspect' s ambiguous or equivocal reference to remaining silent but could continue to interview the suspect. The suspect had said, "Well, I'm done talking then," in a context that suggested he feared retaliation from others for talking to the police. The court contrasted this to an ambiguous or equivocal request for counsel, which police in Alaska are required to clarify. *State v. Munson*, Mem. Op. No. 4494 (11/21/01).

Discretionary parole eligibility – mitigated presumptive term. A defendant who establishes one or more mitigating factors and is sentenced to a mitigated presumptive term is not eligible for discretionary parole during the term. *State v. Cofey*, Op. No. 1775 (Alaska App., December 7, 2001). Some judges had previously wrongly interpreted the applicable statutes as giving them the authority to make any portion of the sentence above the minimum term "nonpresumptive" – i.e., allowing them to make defendant eligible for discretionary parole for any periods above the minimum term.

Discretionary parole eligibility – consecutive presumptive terms. If sentenced to consecutive presumptive terms, the defendant must serve the presumptive term for the most serious offense before he or she will become eligible (under the applicable parole statutes) for discretionary parole during the remainder of the composite term. *State v. Cofey*, Op. No. 1775 (Alaska App., December 7, 2001).

Discretionary parole eligibility – aggravated presumptive term. If sentenced to an aggravated presumptive term, the defendant must serve the presumptive term before he or she will become eligible for discretionary parole during the remainder of the aggravated presumptive term *State v. Cofey*, Op. No. 1775 (Alaska App., December 7, 2001).

Execution of arrest warrant. The police have no statutory or common-law tort duty to execute an arrest warrant within a certain period of time,

held the Alaska Supreme Court in a civil case. *Wongittilin v. State*, Op. No. 5509 (Alaska, December 7, 2001). Wongitillin's personal representative had brought suit on facts involving a trooper who saw a defendant but failed to execute the arrest warrant for him. The defendant later drove while intoxicated and struck and killed Wongtillin.

Attacking prior convictions that are elements of the instant charged crime. When a defendant is charged with a crime for which the elements or applicable sentencing range depend on a prior conviction – such as the crime of felon-in-possession or a presumptive term – the defendant may not attack the validity of the underlying conviction in that same proceeding. The defendant must pursue the attack on the underlying conviction in a separate post-conviction proceeding, with one exception. The one exception is where the defendant claims his prior conviction was obtained through a deprivation of his right to counsel. In this one instance, the defendant can attack the prior conviction in the same proceeding in which he is being charged with the new crime. *Brockway v. State*, Op. No. 1777 (Alaska App., December 21, 2001).

Least serious mitigating factor – felon in possession. A felon-in-possession conviction did not qualify for the least serious mitigating factor where the defendant had possessed the weapon while drunk and the weapon was loaded. *Brockway v. State*, Op. No. 1777 (Alaska App., December 21, 2001).

Investigative stop – reasonable suspicion required to open hand. During an investigative stop of a person, a police officer must have a reasonable suspicion that the person is armed or otherwise posed a threat to the officer's safety before the officer can require the person to open his or her closed hand. Mere suspicion that the person is hiding drugs is not sufficient. *Albers v. State*, Op. No. 1779 (Alaska App., December 28, 2001).

Basis for reasonable suspicion of dangerousness. Reasonable suspicion that someone is armed or dangerous can be based on the person's actions or the surrounding circumstances. *Albers v. State*, Op. No. 1779 (Alaska App., December 28, 2001).

Reviewing whether reasonable suspicion exists. Courts should not engage in hair-splitting when determining whether reasonable suspicion that someone is armed or dangerous exists nor unjustifiably limit an officer's ability to protect himself. *Albers v. State*, Op. No. 1779 (Alaska App., December 28, 2001).